Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1-24-61 OF 1996
ABDUL KADIR SULAIMAN J
5 NOVEMBER 1997

Islamic Law *— Jurisdiction — Syariah court — Renunciation of Islam by plaintiff — Application for declaration that renunciation was valid — Application for declaration that defendant's consent not required for renunciation — Whether jurisdiction within High Court or syariah court — Federal Constitution art 121(1A)*

The plaintiff was born a Buddhist and embraced the religion of Islam under the name of Md Hakim Lee. However, subsequently by a deed poll and a statutory declaration, he had renounced the religion of Islam and showed an intention to use the name Lee Leong Kim. The plaintiff deposed that his action is guaranteed by art 11 of the Federal Constitution and no authority or body can limit or hinder his freedom. The defendant raised a preliminary issue of the jurisdiction of the High Court to entertain the plaintiff's application in light of art 121(1A) of the Constitution. The High Court had to decide whether it had the jurisdiction to adjudicate on the application of the plaintiff.

Held, dismissing the application:

This matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the syariah court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') because under art 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court (see pp 688H–I and 689A); *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 followed; *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231 not followed.

[Bahasa Malaysia summary

Plaintif dilahirkan sebagai seorang penganut Buddha dan telah memeluk agama Islam di bawah nama Md Hakim Lee. Walau

bagaimanapun, berikutnya melalui suratikatan pol dan perisytiharan statutori, beliau telah menolak agama Islam dan menunjukkan hasrat untuk menggunakan nama Lee Leong Kim. Plaintif mendeposkan bahawa tindakannya dijamin oleh perkara 11 Perlembagaan Persekutuan dan tiada pihak berkuasa atau badan boleh menghadkan atau mengongkong kebebasannya. Defendan membangkitkan isu permulaan tentang bidang kuasa Mahkamah Tinggi untuk melayan permohonan plaintif memandangkan perkara 121(1A) Perlembagaan. Mahkamah Tinggi harus menentukan sama ada ia mempunyai bidang kuasa untuk menghakimi permohonan plaintif.

Diputuskan, menolak permohonan:

Perkara plaintif ini yang melibatkan penentuan tarafnya atas penolakan agama Islam menerusi suratikatan pol dan perisytiharan statutori adalah di luar bidang kuasa mahkamah ini untuk menentukan, dengan mengambil kira penyingkiran bidang kuasa oleh perkara 121(1A) Perlembagaan Persekutuan. Disebabkan perenggan 1 dalam Senarai II Jadual Kesembilan Perlembagaan Persekutuan, bidang kuasa terletak dengan mahkamah syariah pada bidang kuasanya yang lebih luas atas orang yang menganuti agama Islam biarpun tiada peruntukan nyata diperuntukkan dalam Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta tersebut') kerana di bawah perkara 74 Perlembagaan, ia adalah dalam kompetens perundangan untuk menggubal atas perkara ini. Peninggalannya daripada peruntukan nyata dalam Akta tersebut tidak akan mengurniakan bidang kuasa di mahkamah sivil. Hakikat bahawa plaintif mungkin tidak mempunyai remedinya di mahkamah syariah tidak akan menyebabkan bidang kuasa boleh dilaksanakan oleh mahkamah sivil (lihat ms 688H–I dan 689A); *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 dan *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 diikut; *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231 tidak diikut.]

[*Editorial Note*: The plaintiff filed an appeal to the Court of Appeal on 6 January 1998.]

Notes

For cases on jurisdiction of the syariah court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 384–391.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (folld)

Hajjah Mahani bt Sulaiman & Ors v Majlis Agama Islam & Adat Melayu Terengganu [1996] 3 AMR 2898 (refd)

Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996] 3 CLJ 231 (not folld)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (folld)
Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994] 1 MLJ 690 (refd)

Legislation referred to

Federal Constitution arts 11, 74, 121(1A)
Rules of the High Court 1980 O 18 r 19
Administration of Islamic Law (Federal Territories) Act 1993 ss 46, 47

Karpal Singh (*Karpal Singh & Co*) for the plaintiff.
Tuan Haji Sulaiman bin Abdullah (*Zain & Co*) for the defendant.

Abdul Kadir Sulaiman J: This is an application by the plaintiff for the following reliefs:

(a) a declaration that his renunciation of the Islamic religion by a deed poll dated 12 October 1995 is in accordance with the law and valid;

(b) a declaration that he is not required to obtain the consent of the defendant to renounce the religion of Islam;

(c) costs; and

(d) any further or other relief the court deems fit and just.

According to his supporting affidavit wherein the deed poll and a statutory declaration of 12 October 1995 were exhibited, the plaintiff was born a Buddhist. He embraced the religion of Islam on 30 March 1978 and used the name of Md Hakim Lee. But by the deed poll and the statutory declaration, he has renounced the religion of Islam and showed an intention to use the name of Lee Leong Kim in place of Md Hakim Lee. He deposed that his action is guaranteed by art 11 of the Federal Constitution and as such, no authority or body could limit or hinder his freedom. The defendant did not file any affidavits in opposition to this application of the plaintiff. However, the defendant filed a summons-in-chambers to have the said application of the plaintiff struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), on the ground that the High Court has no jurisdiction to hear this application of the plaintiff by virtue of art 121(1A) of the Federal Constitution. After submissions made before me on this application by summons-in-chambers of the defendant but before a decision was made, by consent, the defendant withdrew its summons and thereby leaving the substantive application of the plaintiff to be proceeded on with a hearing with the defendant raising the issue of the jurisdiction of this court to entertain this application of the plaintiff in the light of art 121(1A) of the Federal Constitution, as a preliminary issue. On the hearing of the application of the plaintiff aforesaid, both learned counsels for the parties made no submissions but agreed to adopt wholly their submissions made during the proceedings under O 18 r 19 of the RHC in as far as they are relevant to the application of the plaintiff. With that, my decision on the threshold jurisdiction of this court to hear the substantive application of the plaintiff follows.

Clause (1A) was added to art 121 of the Federal Constitution by Act A704 and came into force on 10 June 1988. Clauses (1) and (1A) of art 121 state as follows:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
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> (a) one in the states of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
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> (b) one in the states of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
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> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
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> (1A) The courts referred to in cl (1) shall have no jurisdiction in respect of *any matter within the jurisdiction of the syariah courts*.
> (Emphasis added.)

To my mind, the language of art 121(1A) used by the legislature is clear and without any ambiguity. The civil courts, in this case, the High Court, has no jurisdiction in respect of any matter that is within the jurisdiction of the syariah courts. What then is the matter that is within the jurisdiction of the syariah courts? Is the matter of the declaration sought by the plaintiff by his application a matter within the jurisdiction of the syariah courts and therefore, this court is prevented by art 121(1A) of the Federal Constitution from adjudicating? Having determined the matter, the necessary question that follows is what is the jurisdiction of the syariah courts? Is it confined only to those express jurisdiction given by the relevant state enactment or the wider jurisdiction of the courts which include those jurisdiction which is not so expressly enacted but inherent in the courts itself?

According to the Ninth Schedule to the Federal Constitution, Islamic law and personal and family law of persons professing the religion of Islam is included in para 1 of List II which is called the State List. The said para 1 states:

> Except with respect to the Federal Territories of Kuala Lumpur and Labuan, *Islamic law and personal and family law of persons professing the religion of Islam*, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion*, except in regard to matters included in the Federal List; *the constitution, organization and procedure of*

> *syariah courts which shall have jurisdictions only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph*, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; *the determination of matters of Islamic law and doctrine and Malay custom.* (Emphasis added.)

To my mind, having considered art 74 and para 1 of the State List in the Constitution, the jurisdiction of the syariah court is much wider than those expressly conferred upon it by the respective state legislature. The syariah court shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof. It is not to be limited only to those expressly enacted. The matters include Islamic law and personal and family law of persons professing the religion of Islam. They include cognizance over offences by persons professing the religion of Islam against precepts of that religion. The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the syariah court within the contemplation of para 1 of the State List and which jurisdiction is ousted from the courts mentioned in art 121(1) of the Constitution. If the state legislature has not as yet legislated specifically on the matter, it is within its competency to do so in the future by virtue of the powers given under art 74 of the Federal Constitution. Therefore, when these matters are in issue, the jurisdiction is clothed in the syariah court and not in the courts mentioned in art 121(1), notwithstanding the absence of express provisions in the state enactments at the time the issue arises. That is the intention of art 121(1A) when it states in no uncertain term that the civil courts in art 121(1), which include the High Courts, shall not have jurisdiction over the matter. The fact that the syariah courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the state legislature, does not mean that the jurisdiction must be exercised by the courts in art 121(1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate — the threshold jurisdiction to be seized of the matter. Referring to the case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, Harun Hashim SCJ at p 802 said:

> With respect, I think that the learned judge in arriving at his decision fell into the error of isolating and treating the allegations of assault and battery as an actionable wrong simpliciter (which is clearly within the jurisdiction of the High Court) without regard to the fact that this is a matter for Islamic family law within the jurisdiction of the syariah court. It seems to me that the learned judge was under the impression that if the High Court did not give a remedy, the wife would not have any remedy.

Reverting to the facts in this application of the plaintiff, he prays for the two declarations mentioned above. It is his own admission, as contained in his affidavit in support, that he embraced the religion of Islam on 30 March 1978. Therefore, as of that date, he was a person professing the religion of Islam and was no longer a Buddhist. In pursuant of para 1 of List II, the court having the jurisdiction over him in respect of the matters sought in

his application must be the syariah court because it falls within the category of personal law of persons professing the religion of Islam. Provided the jurisdiction to adjudicate on this matter is given by the state legislature, it is only the syariah court which could validly make a declaration whether his renunciation of the Islamic religion through the deed poll of 12 October 1995 is in accordance with law and valid, and also to declare whether or not he is required to obtain the consent of the defendant to renounce Islam. As from 10 June 1988, this jurisdiction in this court which it hitherto enjoyed had expressly been taken away by art 121(1A) of the Federal Constitution.

In *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231, my learned brother held the view to the contrary. He held that the syariah court is not a creature of syariah law (hukum syarak). It owes its existence to the written laws of Parliament and state legislatures. As such, it is his view that in order to ascertain the question of jurisdiction of the syariah court, it is incumbent that reference be made to these laws and see whether jurisdiction over the particular matter is given to the syariah court or the civil court. While it is true that the constitution, organization and procedure of the syariah court is to be so provided by the respective state legislature as so stated in para 1 of the State List read with art 74 of the Federal Constitution, the issue at hand is not one of the constitution, organization and procedure of the syariah court. The issue is a substantive one which a syariah court, having *jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included* in para 1 of the State List, has the power to adjudicate, and as pointed out earlier, the prayers sought in the application is one touching on the personal law of *persons professing the religion of Islam*. Therefore, with respect, it cannot be true to say that in order to ascertain the question of jurisdiction of the syariah court, reference be made only to the respective laws enacted by the state legislature to see whether jurisdiction over the particular matter is given to the syariah courts or the civil courts provided in art 121(1) of the Constitution. To seek the jurisdiction of the syariah court, List II of the Ninth Schedule to the Federal Constitution should not be interpreted so narrowly in the light of the overall jurisdiction given by the Constitution in List II that the syariah court shall have jurisdiction over persons professing the religion of Islam in respect of matters stated therein. In *Mohamed Habibullah*'s case, Harun Hashim SCJ at p 800 said:

> It is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the syariah court: *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the syariah court has jurisdiction and *not whether the state legislature has power to enact the law conferring jurisdiction on the syariah court.* The validity of a state law can only be questioned in a separate proceeding under art 4(3) of the Federal Constitution ... . And by art 4(4) read with art 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3). (Emphasis added.)

A Section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act'), in so far as is relevant to this present application of the plaintiff, states as follows:

> (1) A syariah court shall have jurisdiction throughout the Federal Territories and shall be presided over by a syariah judge.
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> B (2) A syariah High Court shall —
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> (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all parties are Muslim and which relate to —
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> (x) other matters in respect of which jurisdiction is conferred by any written law.

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and s 47 thereof states as follows:

> (1) A syariah subordinate court shall have jurisdiction throughout the Federal Territories and shall be presided over by a judge of the syariah subordinate court.
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> D (2) The syariah subordinate court shall —
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> ...
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> (b) in its civil jurisdiction, hear and determine all such actions and proceedings as the syariah High Court is authorized to hear and determine in which the amount or value of the subject-matter in dispute does not exceed RM50,000 or is not capable of estimation
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> E in terms of money.
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> (3) The Yang di-Pertuan Agong may from time to time, by notification in the Gazette, extend the civil jurisdiction of the syariah subordinate court.

F The jurisdiction of the syariah courts given by the Act, in the light of the provisions provided by para 1 of List II mentioned earlier, cannot in any way limit the wider jurisdiction of the courts to deal over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof, as construed narrowly by my learned brother in *Lim Chan Seng*, by the mere fact that the jurisdiction to decide on the matter of the application
G of the plaintiff here is not so expressly stated in the Act. If I may call, the wider jurisdiction given by para 1 of List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the syariah court, subject of course to the right to exercise that jurisdiction being expressly given by the Act which power is within the competency of the legislature to do under art 74.

H Harun Hashim SCJ in *Mohamed Habibullah*'s case took the objective view of the Constitution thus, at p 803:

> Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident
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> I from the Ninth Schedule to the Constitution. ... Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the syariah courts but also by

the civil courts. What art 121(1A) has done is to grant exclusive jurisdiction to the syariah courts in the administration of such Islamic laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the syariah courts.

Gunn Chit Tuan SCJ in *Mohamed Habibullah*'s case, in response to the submission by learned counsel, said at p 822:

> With respect to the submission of Mr Balwant Singh Sidhu regarding whether the plaintiff could be considered an apostate, reference ought to be made to the dictum of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the syariah court.

Citing *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, Mohd Azmi SCJ in *Mohamed Habibullah*'s case had this to say at p 814:

> In *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam* at p 9, Mohamed Yusoff SCJ, has also expressed the following views:
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> 'It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.
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> The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
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> On this view, it is imperative that the determination of the question in issue requires substantial consideration on the Islamic law by relevant jurists qualified to do so. *The only forum qualified to do so is the syariah court.*' (Emphasis added.)

Therefore, on the principle adumbrated in *Mohamed Habibullah* and *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the syariah court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art 74 of the

A Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court.

B As for the decisions so far given by the courts of coordinate jurisdiction on the interpretation of art 121(1A) of the Federal Constitution as cited in the arguments, with respect, I would agree with the decision given in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 1 MLJ 690 that the civil court had no jurisdiction to make a declaration of the nature sought by the plaintiff in this application. So is C the decision given in *Hajjah Mahani bt Sulaiman & Ors v Majlis Agama Islam & Adat Melayu Terengganu* [1996] 3 AMR 2898.

In the circumstances, on a preliminary issue of law, I dismiss this application of the plaintiff with costs as this court has no jurisdiction to adjudicate in the matter prayed in the application in the light of art 121(1A) D of the Federal Constitution.

Plaintiff's application dismissed.

Reported by Hanim Kamaruddin

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